

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

EMMANUEL CABALLERO,

Plaintiff,

v.

ROMEO ARANAS, *et al.*,

Defendants.

Case No. 3:19-cv-00079-MMD-WGC

ORDER

I. SUMMARY

Pro se Plaintiff Emmanuel Caballero, currently incarcerated and in the custody of the Nevada Department of Corrections (“NDOC”), alleges violation of Eighth Amendment deliberate indifference to serious medical needs pertaining to dental care under 42 U.S.C. § 1983. (ECF Nos. 3, 4.) Before the Court are two Reports and Recommendations (ECF Nos. 73, 74 (“R&Rs”)) of United States Magistrate Judge Carla L. Baldwin.¹ The R&Rs recommend the Court deny Plaintiff’s motion for preliminary injunction (ECF No. 29), and that Plaintiff’s motion for leave to file a first amended complaint (ECF No. 30) and motion to extend discovery (ECF No. 28) be granted, in part, and denied, in part.

In response, Plaintiff filed a motion to extend time to object to the R&Rs (ECF No. 76), and shortly thereafter filed his objections (ECF Nos. 79, 80 (“Objections”)).² As further explained below, the Court will overrule Plaintiff’s Objections because the Court agrees

¹This case was originally referred to Magistrate Judge Baldwin. The case is now referred to Magistrate Judge William G. Cobb after Judge Baldwin recused on January 4, 2021. (ECF Nos. 87, 88.)

²The Court grants Plaintiff’s motion to extend time and will consider both objections. The Court has additionally reviewed Defendants corresponding replies. (ECF Nos. 93, 101.)

1 with Judge Baldwin's recommendations and will adopt the R&Rs in full. Moreover, upon a
 2 *de novo* review of Plaintiff's proposed first amended complaint (ECF No. 30-1 ("FAC")),
 3 the Court includes Summer Jacobson³ as Defendant in Count I of Plaintiff's Eighth
 4 Amendment deliberate indifference claim.

5 Plaintiff additionally filed a motion to compel production of documents (ECF No.
 6 83), and a motion to strike and demand for sanctions (ECF No. 84). Defendants filed a
 7 response opposing the latter motion but opted not to oppose the motion to compel. (ECF
 8 Nos. 100, 102.) Accordingly, the Court grants Plaintiff's motion to compel the production
 9 of documents as access is available to Plaintiff and has already been granted. As further
 10 discussed below, the Court denies Plaintiff's motion to strike and demand for sanctions as
 11 the motion is unwarranted and without merit.

12 **II. BACKGROUND**

13 The Court incorporates by reference Judge Baldwin's recitation of factual
 14 background and procedural history provided in the R&Rs, which the Court adopts here.
 15 (ECF Nos. 73 at 1-3, 74 at 1-2.) Relevant to this order, the deadline to file objections to
 16 Judge Baldwin's R&Rs was December 25, 2020. (ECF Nos. 73, 74.) Plaintiff filed on
 17 December 21, 2020, a motion to extend the objection deadline to January 24, 2021. (ECF
 18 No. 76.) Plaintiff thereafter filed on December 24, 2020 and December 30, 2020, his
 19 objections to Judge Baldwin's R&Rs. (ECF Nos. 79, 80.)⁴

20 In the Objections, Plaintiff concedes that Counts III, IV, and V in Plaintiff's FAC
 21 should be dismissed. (ECF No. 80 at 5.) Plaintiff additionally does not object to Judge
 22 Baldwin's recommendation that Plaintiff's motion to extend discovery be granted, in part,
 23 and denied, in part. (See ECF No. 80.)

24
 25
 26 ³Plaintiff named dental assistant Jane Doe in Plaintiff's FAC (ECF No. 30-1 at 5),
 and later identified Jane Doe as Summer Jacobson (ECF No. 80 at 3-4).

27 ⁴Plaintiff's second objection (ECF No. 80) was filed after the December 25, 2020
 28 deadline. Plaintiff appropriately sought an extension prior to the deadline and provided
 good cause for the extension. (See ECF No. 76.)

III. LEGAL STANDARD

A. Review of the Magistrate Judge's Recommendation

This Court “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1). Where a party timely objects to a magistrate judge’s report and recommendation, then the Court is required to “make a *de novo* determination of those portions of the [report and recommendation] to which objection is made.” *Id.* The Court will conduct a *de novo* of the portions of the R&Rs to which Plaintiff objects. (ECF Nos. 79, 80.)

B. Preliminary Injunction Standard

Federal Rule of Civil Procedure 65 governs preliminary injunctions. “An injunction is a matter of equitable discretion’ and is ‘an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.’” *Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 32 (2008)). This relief is “never awarded as of right.” *All. For The Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). To qualify for a preliminary injunction, a plaintiff must satisfy four requirements: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the balance of equities favors the plaintiff; and (4) the injunction is in the public interest. See *Winter*, 555 U.S. at 20. A plaintiff may also satisfy the first and third prongs by showing serious questions going to the merits of the case and that a balancing of hardships tips sharply in plaintiff’s favor. *Cottrell*, 632 F.3d at 1135 (holding that the Ninth Circuit Court of Appeals’ “sliding scale” approach continues to be valid following the *Winter* decision). On the merits-success prong, “the burdens at the preliminary injunction stage track the burdens at trial.” *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006); see also *id.* at 428 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

A more stringent standard is applied when a party seeks mandatory, as opposed to prohibitory, preliminary relief. See *Anderson v. United States*, 612 F.2d 1112, 1115 (9th Cir. 1979). Where “a party seeks mandatory preliminary relief that goes well beyond

maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction.” *Martin v. Int’l Olympic Comm.*, 740 F.2d 670 (9th Cir. 1984) (emphasis in original). Courts should deny mandatory preliminary relief “unless both the facts and the law clearly favor the moving party.” *Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir. 2015) (quoting *Anderson*, 612 F.2d 1112, 1114 (9th Cir. 1979)).

IV. DISCUSSION

Following a *de novo* review of the R&Rs, relevant briefs, and other records in this case, the Court finds good cause to accept and adopt Judge Baldwin’s R&Rs. The Court will first address Plaintiff’s Objections below, and then will address Plaintiff’s motion to strike and demand for sanctions.

A. Plaintiff’s Objections

1. Merits of Eighth Amendment Claim

Judge Baldwin recommends that Plaintiff’s motion for preliminary injunction be denied because Plaintiff has not shown a likelihood of success on the merits of his underlying Eighth Amendment deliberate indifference claim. (ECF No. 73 at 5-6.) She found that evidence submitted by Defendants showed Plaintiff received dental care and had approximately 27 dental appointments from December 2016 to December 2019. (*Id.* at 5.) Plaintiff generally counters that dental charts provided by Defendants are a “false misrepresentation” of events and offer photos of Plaintiff’s teeth as evidence of inadequate care. (ECF No. 79 at 7-10, 47-50.) The Court does not find Plaintiff’s argument convincing, and having reviewed the record, the Court agrees with Judge Baldwin that the motion should be denied.

The Eighth Amendment prohibits the imposition of cruel and unusual punishment and “embodies ‘broad and idealistic concepts of dignity, civilized standards, humanity, and decency.’” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A prison official violates the Eighth Amendment when he or she acts with “deliberate indifference” to the serious medical needs of an inmate. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). “To establish an Eighth Amendment violation, a plaintiff must satisfy both an objective standard—that the

1 deprivation was serious enough to constitute cruel and unusual punishment—and a
2 subjective standard—deliberate indifference.” *Snow v. McDaniel*, 681 F.3d 978, 985 (9th
3 Cir. 2012).

4 To establish the first prong, “the plaintiff must show a serious medical need by
5 demonstrating that failure to treat a prisoner’s condition could result in further significant
6 injury or the unnecessary and wanton infliction of pain.” *Jett v. Penner*, 439 F.3d 1091,
7 1096 (9th Cir. 2006) (internal quotations omitted). To satisfy the deliberate indifference
8 prong, a plaintiff must show “(a) a purposeful act or failure to respond to a prisoner’s pain
9 or possible medical need and (b) harm caused by the indifference.” *Id.* “Indifference may
10 appear when prison officials deny, delay or intentionally interfere with medical treatment,
11 or it may be shown by the way in which prison physicians provide medical care.” *Id.*
12 (internal quotations omitted). When an inmate alleges delay of medical treatment evinces
13 deliberate indifference, the inmate must show the delay led to further injury. *See Shapley*
14 *v. Nev. Bd. of State Prison Comm’rs*, 766 F.2d 404, 407 (9th Cir. 1985) (holding that “mere
15 delay of surgery, without more, is insufficient to state a claim of deliberate medical
16 indifference”). Additionally, “[a] difference of opinion between a prisoner-patient and prison
17 medical authorities regarding treatment does not give rise to a § 1983 claim.” *Franklin v.*
18 *Or., State Welfare Div.*, 662 F.2d 1337, 1344 (9th Cir. 1981).

19 Plaintiff’s preliminary injunction motion asserts that Defendants were not providing
20 Plaintiff basic dental care for his tooth (“No. 19”) since 2016. (ECF No. 29 at 2.) After three
21 years of Defendants’ failure to treat tooth No. 19, it was extracted on April 11, 2019, and
22 the failure to treat it with a filling or root canal has led to the decay and rotting of another
23 tooth (“No. 15”). (*Id.* at 3.) Plaintiff however offers little by way of evidence to support this
24 specific claim, nor does he offer evidence to counter Defendants’ assertion that Plaintiff
25 has been receiving treatment on tooth No. 19 since April 2017, and that Plaintiff refused
26 antibiotics to treat the infection caused by tooth No. 19. (ECF No. 40 at 6.)

27 Moreover, Plaintiff’s assertion that the delayed dental care caused further harm is
28 misleading by implying the poor condition of tooth No. 15 was the result of Defendants’

three-year delay in treating tooth No. 19. As early as April 26, 2017, Plaintiff acknowledged Dr. Gene Yup⁵ had informed Plaintiff of the potential adverse medical consequences of refusing the extraction of tooth No. 19., and Plaintiff nonetheless refused this treatment. (*Id.* at 2; ECF No. 42-2 at 5 (sealed).) As Judge Baldwin appropriately acknowledges, Plaintiff may disagree with a chosen course of treatment by preferring a root canal over a tooth extraction, but the difference in judgment between the inmate and the prison medical official does not, as a matter of law, establish deliberate indifference according to the Ninth Circuit. (ECF No. 73 at 5-6 (citing *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004)).

Plaintiff therefore fails to show a likelihood of success on the merits of his underlying Eighth Amendment deliberate indifference claim to warrant preliminary injunction relief. See *Winter*, 555 U.S. at 20. Plaintiff thus cannot meet the more stringent standard for mandatory preliminary injunction, and the Court denies Plaintiff's motion for preliminary injunction. See *Anderson*, 612 F.2d at 1115.

2. Irreparable harm

Judge Baldwin recommends that Plaintiff's motion for preliminary injunction be denied because Plaintiff has not shown he will likely suffer irreparable harm. (ECF No. 73 at 6.) She reasoned that tooth No. 15 was treated by Dr. Benson *after* Plaintiff filed his motion, and therefore the relief requested is moot. (*Id.*) If it remains that Plaintiff is likely to suffer irreparable harm, it is Plaintiff's burden to persuade the Court that this remains true. (*Id.*) Plaintiff's objection fails to do so and merely states that "tooth decay is a continual process leading to larger health problems and often excruciating pain." (ECF No. 79 at 5.) Additionally, Plaintiff in fact recognized Dr. Benson treated tooth No. 15 in 2020. (*Id.* at 10.) As Judge Baldwin therefore correctly found, the relief requested in Plaintiff's motion is moot, and after the Court's consideration of Plaintiff's objection, it remains moot. Plaintiff therefore has failed to show the likelihood of irreparable harm required for a

⁵On July 13, 2020, the Court allowed the substitution of the Estate of Gene Hing Yup by and through Catherine Yup as personal representative to Defendant Gene Yup. (ECF No. 33.)

1 preliminary injunction. See *Winter*, 555 U.S. at 20.

2 3. Leave to File Amended Complaint

3 Judge Baldwin recommends Plaintiff's motion for leave to file a first amended
4 complaint be granted, in part, and denied, in part. (ECF No. 74 at 3-6.) More specifically,
5 she recommends that 16 defendants named in Plaintiff's FAC be dismissed.⁶ (*Id.*) She
6 further recommends at this stage that Count I's deliberate indifference to serious medical
7 needs alleged against Defendants Gene Yup, Melissa Mitchell, Dr. Peterson, Dr. Benson,
8 and Jenny Vargas proceed, and that the remainder of Count I, and Counts II through V,
9 be denied. (*Id.*) Plaintiff notably objects to the dismissal of dental assistant, Summer
10 Jacobson, who was "directly involved in [Plaintiff's] dental treatment, writing
11 medical/dental directives for [his] dental treatment, responding to [his] grievances related
12 to [his] dental treatment." (ECF No. 80 at 3.)⁷ Following a *de novo* review of Plaintiff's FAC,
13 the Court agrees with Judge Baldwin's recommendation regarding Plaintiff's motion, but
14 also agrees here with Plaintiff's objection.

15 Plaintiff named Summer Jacobson as a defendant in Plaintiff's FAC. (ECF No. 30-
16 1 at 5.) Plaintiff alleges that he filed and forwarded dental x-rays to Jacobson but faced long
17 delays and received responses from Jacobson stating that Plaintiff was "on a waiting list
18 to see a dentist." (*Id.* at 18.) Plaintiff asserts that his x-rays disclosed he was in serious pain
19 and had "injuries from cavities and infected, and inflamed teeth." (*Id.*) On April 11, 2019,
20 Jacobson was present at Plaintiff's dental visit when dental assistant Jenny Vargas denied
21 Plaintiff a long-handle toothbrush prescribed by Dr. Benson. (*Id.* at 16.) Jacobson also
22 stated then, "[m]aybe we need to bring in our lawyers." (*Id.*) (parentheses omitted).

23 Liberally construed, Plaintiff's FAC alleges Jacobson knew of Plaintiff's serious
24 medical need and took part in the effort of Vargas and Dr. Benson in denying treatment to

25
26 ⁶The 16 defendants listed did not include Jane Doe (Summer Jacobson), who was
named a defendant in Plaintiff's FAC. (See *id.*; ECF No. 30-1.)

27 ⁷Plaintiff raised additional objections to Judge Baldwin's recommendations
28 regarding Plaintiff's motion to leave to file an amended complaint. The Court declines to
address these objections as further discussion is unnecessary and unwarranted.

1 Plaintiff. See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)
 2 (articulating that *pro se* pleadings must be liberally construed). The Court thus finds that
 3 Plaintiff also states a colorable Eighth Amendment deliberate indifference to serious
 4 medical needs claim against Jacobson. Accordingly, and in agreement with Judge
 5 Baldwin's recommendation, Plaintiff's motion for leave to file a first amended complaint is
 6 granted as to Count I's deliberate indifference to serious medical needs claim against
 7 Defendants Yup, Mitchell, Peterson, Benson, Vargas, *and* Jacobson.

8 **B. Motion to Strike and Demand Sanctions**

9 Plaintiff is seeking sanctions against Defendants' counsel. (ECF No. 84.) Plaintiff
 10 alleges that counsel "knowingly and intentionally presented [] ECF No. 40 knowingly and
 11 with calculation and malice to have Defendant Mitchell, an untrained Nurse posing as a
 12 DENTIST which is FRAUD and misrepresentation." (*Id.* at 2-3 (emphasis in original).)
 13 Plaintiff further alleges that counsel's "sole 'intention' [is] to harass and to cause
 14 unnecessary delay and/or needlessly increase the costs to litigate this Action." (*Id.* at 3.)
 15 Based on these allegations, Plaintiff moves to strike Defendants' response to his motion
 16 for preliminary injunction (ECF No. 40) under Rule 12(f) of the Federal Rules of Civil
 17 Procedure. (*Id.* at 2-3.) Defendants deny these allegations and counter that Plaintiff has
 18 failed to describe specifically the manner in which Defendants' counsel has posed nurse
 19 Mitchell to be a dentist. (ECF No. 102 at 4.) Having reviewed the record, the Court agrees
 20 with Defendants and finds Plaintiff's allegations to be unwarranted and without merit. The
 21 Court thus denies Plaintiff's demand for sanctions, and accordingly will deny Plaintiff's
 22 motion to strike.

23 **V. CONCLUSION**

24 The Court notes that the parties made several arguments and cited to several cases
 25 not discussed above. The Court has reviewed these arguments and cases and determines
 26 that they do not warrant discussion as they do not affect the outcome of the motions before
 27 the Court.

28 It is therefore ordered that the Report and Recommendations of Magistrate Judge

1 Carla L. Baldwin (ECF Nos. 73, 74) are accepted and adopted in full.

2 It is further ordered that Plaintiff's motion to extend time (ECF No. 76) to object to
3 the R&Rs is granted.

4 It is further ordered that Plaintiff's motion for preliminary injunction (ECF No. 29) is
5 denied.

6 It is further ordered that Plaintiff's motion to compel production of documents (ECF
7 No. 83) is granted.

8 It is further ordered that Plaintiff's motion to strike and demand sanctions (ECF No.
9 84) is denied.

10 It is further ordered that Plaintiff's motion for leave to file a first amended complaint
11 (ECF No. 30), is granted, in part, and denied, in part.

12 The Clerk of Court is directed to file Plaintiff's first amended complaint (ECF No.
13 30-1) and send Plaintiff a courtesy copy of the first amended complaint.

14 It is further ordered that Plaintiff's claim of deliberate indifference to serious medical
15 needs (Count I) will proceed against Defendants Gene Yup, Melissa Mitchell, Dr.
16 Peterson, Dr. Benson, Jenny Vargas, and Summer Jacobson.

17 The Clerk of Court is directed to substitute Jane Doe with Summer Jacobson as
18 Defendant in this action. The Clerk of Court is further directed to issue a summons for
19 Defendant Jacobson and deliver the same to the U.S. Marshal for service. The Clerk of
20 Court is further directed to send to Plaintiff one USM-285 form. The Clerk of Court is also
21 directed to send a copy of the first amended complaint (ECF No. 30-1) and a copy of this
22 order to the U.S. Marshal for service on Defendant Jacobson. Plaintiff has 30 days within
23 which to furnish to the U.S. Marshal the required USM-285 form with relevant information
24 as to Defendant Jacobson. Within 20 days after receiving from the U.S. Marshal a copy of
25 the USM-285 form showing whether service has been accomplished, Plaintiff must file a
26 notice with the Court identifying the served Defendant Jacobson. If Plaintiff wishes to have
27 service again attempted on an unserved Defendant Jacobson, then a motion must be filed
28 with the Court identifying unserved Defendant Jacobson and specifying a more detailed

1 name and/or address for said Defendant, or whether some other manner of service should
2 be attempted. If Plaintiff fails to follow this order, the above-named Defendant Jacobson
3 will be dismissed for failure to complete service of process pursuant to Rule 4(m) of the
4 Federal Rules of Civil Procedure.

5 It is further ordered that Plaintiff must serve on Defendant Jacobson or, if
6 appearance has been entered by counsel, upon the attorney(s), a copy of every pleading,
7 motion or other document submitted for consideration by the Court. Plaintiff must include
8 with the original paper submitted for filing a certificate stating the date that a true and
9 correct copy of the document was mailed to Defendant Jacobson or counsel for Defendant
10 Jacobson. The Court may disregard any paper received by a district judge or magistrate
11 judge which has not been filed with the Clerk of Court and any paper received by a district
12 judge, magistrate judge, or the Clerk of Court, which fails to include a certificate of service.

13 It is further ordered that Plaintiff's remaining claims in Count I, and the entirety of
14 Counts II, III, IV, and V, are dismissed.

15 It is further ordered that Defendants Romeo Aranas, M. Naughton, Brian Sandoval,
16 James Dzurenda, Isidro Baca, Adam Laxalt, Dr. Michael Minev, Charles Daniels, Steve
17 Sisolak, Perry Russel, Aaron Ford, M. Sullivan, D. Clark, Danielle Richards, C. Lucas, C.
18 Cerda, and the State of Nevada are dismissed from entirety of the case without prejudice.

19 It is further ordered that Plaintiff's motion to extend discovery (ECF No. 28) is
20 granted, in part, and denied, in part. Plaintiff shall have 90 days from the date this order
21 issues to complete limited discovery as it pertains to Count I's newly named Defendants
22 Dr. Peterson, Dr. Benson, Jenny Vargas, and Summer Jacobson.

23 DATED THIS 19th Day of January 2021.

24 
25 _____
26 MIRANDA M. DU
27 CHIEF UNITED STATES DISTRICT JUDGE
28